APPENDIX

GLEN K. DORSEY, JR. and Barbara J. Dorsey, his wife,
Plaintiffs-Appellants Cross-Appellees,
v.
HONDA MOTOR COMPANY LTD. *et al.*,
Defendants-Appellees Cross Appellants.
HONDA MOTOR COMPANY LTD.,
Defendant-Appellant Cross Appellee,
v.
CONTINENTAL CASUALTY COMPANY,
Defendant-Appellee Cross-Appellant.

No. 79-3845.

United States Court Of Appeals,
Fifth Circuit.
Unit B

Sept. 11, 1981.

Frates, Floyd, Pearson, Stewart, Richman & Greer, Gary D. Fox, Larry S. Stewart, Miami, Fla., for plaintiffs-appellants-cross appellees.

Anthony M. Lanzone & Assoc., Anthony M. Lanzone, Robert A. Calinoff, New York City, for defendants-appellees-cross appellants.

DeWolf, Ward, Morris, Wohlust, Jontz & O'Donnell, John L. O'Donnell, Jr., Thomas B. DeWolf, Orlando, Fla., for Honda Motor Company Ltd.

Akerman, Senterfitt & Eidson, John Edwin Fisher, Orlando, Fla., for Continental Cas. Co.

Joe N. Unger, Miami, Fla., for Honda Motor Co. Ltd., American Honda Motor and Mission Ins.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, and MORGAN and HENDERSON, Circuit Judges.

GODBOLD, Chief Judge:

Plaintiff, Glen K. Dorsey, Jr., suffered serious injuries when his 1971 Honda AN 600, a small automobile, collided with a full size Ford. In this Florida diversity case Dorsey and his wife Barbara sued the manufacturer, Honda Motor Company Ltd., (Honda), and the distributor, American Honda Motor Company, on several alternative grounds: negligent design, [1] negligent failure to warn of defects, strict product liability, and breach of implied warranty. Dorsey also joined as defendant Continental Casualty Company, Honda's liability insurer, as permitted under Florida law. [2] Continental acknowledges that if punitive damages are properly awarded against Honda and if such damages are covered by one of the liability insurers, it will be the insurer responsible.

The jury returned Rule 49 special verdicts in plaintiffs' favor on all theories of liability, and a special verdict finding that in the manufacture and distribution of the automobile Honda Motor Company acted "with wantonness, willfulness or reckless indifference to the rights of others." The jury awarded compensatory damages of $750,000 to Glen and $75,000 to Barbara and punitive damages to Glen of $5,000,000. [3] On motion for judgment n. o. v. the judge let stand the compensatory damages but set aside the punitive damages and entered a judgment under Rule 54(b) on the liability and damage issues.

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[1] The jury was instructed on negligent design with respect to the manufacturer only.

[2] Florida law permits joinder of an insurer as a codefendant. *See Shingleton* v. *Bussey*, 233 So.2d 713 (Fla. 1969); *Beta Eta House Corp.* v. *Gregory*, 237 So.2d 163 (Fla. 1970).

[3] The jury awarded punitive damages against the manufacturer only. The plaintiffs did not seek punitive damages against the distrubutor.

The judge did not submit to the jury issues relating to coverage by Continental Casualty but, as permitted by Rule 49, entered non-jury findings and conclusions on these issues. Although the court had set aside the punitive damages awarded by the jury, for economy of judicial effort in case punitive damages were reinstated on appeal, the court held that Continental could not be liable under its policy for the punitive damage award, if reinstated. A second judgment was entered on these non-jury issues.

On appeal Dorsey asserts as error the judgment n. o. v. taking away punitive damages. By cross-appeal Honda contends that it was entitled to a directed verdict on liability issues, and that the district court erred in ruling that as a matter of law the insurance policy would not cover punitive damages.

We hold: (1) the court did not err in denying Honda's motion for directed verdict on liability; (2) the court erred in setting aside the punitive damages on motion for judgment n. o. v. and, therefore, we direct entry of judgment for Dorsey for the punitive damages awarded by the jury; (3) the holding that Continental is not liable for the punitive damage award is reversed and remanded for further consideration.

I. THE FACTS

The following are the facts in the light most favorable to Dorsey, considered for the purpose of determining whether Honda was entitled to a directed verdict on liability and whether the judge erred in setting aside the award for punitive damages.

In the mid-1960's Honda developed a small, light-weight automobile with high gas mileage. It exported the vehicle to the United States and Europe to meet the demand for a low-price, economical car. The model sold in the United States, the AN 600, was the first automobile sold by Honda in this country. It weighed approximately 1,356 pounds.

Glen K. Dorsey purchased a new 1971 Honda AN 600 in early 1972. He chose the vehicle because it was economical and offered high gas mileage. Dorsey, who is approximately 6 ft. 1½ in. tall, testified that he found the vehicle comfortable to drive and that it had

adequate head and leg room. Dorsey was unaware of the AN 600's specific crash characteristics although he had a general awareness that if a large sedan hit a small vehicle such as a Honda the small vehicle might be severely damaged.

In March 1972 Dorsey's AN 600 collided with a standard size Ford automobile weighing approximately 3,600 pounds. The Honda was traveling at approximately 30 m.p.h. The Ford had braked and was barely moving, at 3 to 5 m.p.h. Dorsey was wearing his lap and shoulder belts and was driving with due care. In the collision, the left "A pillar," the post at the left of the windshield and between the windshield and window, deformed rearward more than ten inches. Dorsey's seat came off its track, ramming him forward and to the left. His seat belt did not adequately restrain him in the collision. Dorsey's legs were jammed against the front of the passenger compartment, causing compound fractures, and his head hit the deformed A pillar, causing massive permanent brain injury. This accident was the equivalent of a 20 m.p.h. barrier crash.[4]

Before Honda began exporting the AN 600 to the United States employees of its wholly owned subsidiary, Honda Research and Development (Honda R&D) conducted crash tests on prototype vehicles in Japan. Honda R&D is not a party to this suit. These tests revealed that a dummy the size of an average adult male, restrained with lap and shoulder belts, would strike the interior front part of the passenger compartment in a 30 m.p.h. barrier crash test. In both a barrier crash test and a test collision against an average size American vehicle the dummy's head struck the A pillar, which had deformed inward. Despite the results of these tests and a recommendation by an employee of Honda R&D to enlarge the vehicle to improve safety, Honda exported the AN 600 to the United States without increasing the vehicle's size or body strength or warning purchasers of its crash characteristics.

In considering the sufficiency of the evidence to support the jury finding of willful, wanton or reckless conduct, it is of no moment that the substantial evidence of such conduct relates to employees of

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[4] Barrier crash tests involve head-on collisions against a concrete wall.

Honda R&D. In the pre-trial order joined in by plaintiffs, Honda and Continental, it was agreed that Honda contended:

> that the vehicle manufactured by Honda Motor Company Ltd. was reasonably designed and manufactured and that Honda Motor Company, Ltd. used reasonable care in the design and testing of all the composite safety features incorporated in the vehicle.

The following principles of law were agreed upon:

> 1. Honda Motor Company Ltd., as the manufacturer is liable for any negligence of [sic—"or"] breach of warranty with respect to any component part which is defectively designed and manufactured even though such part may have been obtained from a third-party supplier.
>
> 2. Honda Motor Company Ltd. as manufacturer, impliedly warranted that the vehicle involved in this action was reasonably crashworthy, i.e., that reasonable care had been used in the design and manufacture of the car to eliminate unreasonable risk of foreseeable injury.
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> 3. Honda Motor Company Ltd., as manufacturer, is strictly liable in tort if it placed on the market a product that is defective, i.e., unreasonably dangerous in that it failed to eliminate unreasonable risk of foreseeable injury.
>
> 4. Honda Motor Company Ltd., as a manufacturer, is under a duty to warn of any dangers inherent in the use of its vehicles in order to eliminate unreasonable risk of foreseeable injuries.

An issue of fact to be litigated was described as:

> Whether reasonable care was used in the design and testing of the car so as to eliminate unreasonable risk of foreseeable injury?

By the pre-trial order, Honda, knowing that design and testing of the car had been done by Honda R&D, accepted responsibility for the acts of Honda R&D in design and testing. Thus, in assaying the evidence of wrongful conduct the acts of Honda R&D are treated as the acts of Honda.

At trial experts testified to a number of measures that would improve the AN 600's safety in collisions. These included lengthening the hood, enlarging the passenger compartment, installing a

heavier engine, using heavier metals in construction, reinforcing the structure by using metal "bones" to fortify the passenger compartment and the A pillars, using a full frame out to the front bumper, redesigning the shoulder belt to reduce the likelihood of "submarining" the passenger, and making seat belts of a fabric with less elasticity.

The AN 600 design met certain federal Motor Vehicle Safety Standards in effect at the time governing seat assemblies, seat belt assemblies, fuel tank integrity, and displacement of the steering column. While the federal statute under which these regulations were passed preempts inconsistent state standards, 15 U.S.C. § 1392(d), compliance with the federal regulations "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c).

II. LIABILITY OF HONDA

[1] Honda contends that it was entitled to a directed verdict on all issues on the ground that the sole proximate cause of Dorsey's injuries was the comparative size of the two vehicles involved in the collision and that under so-called "crashworthiness" cases, notably *Dreisonstok* v. *Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974) (Virginia law), one who buys a small car because it is small cannot complain if he is injured as a consequence of the design characteristic—small size—that he sought. This argument is discussed and rejected below in part III, Punitive Damages.

III. PUNITIVE DAMAGES

The critical portion of the district court's order setting aside the punitive damages is this:

> In the present case, it was basically the diminutive size of the Defendant's product and the difference between its size and that of standard American vehicles which rendered the Defendant's vehicle unsafe in the event of a collision. See the testimony of James McElhaney, Plaintiff's expert. This source of potential harm, however, was obvious on casual observation. Mr. Dorsey recognized when he bought the automobile that it could sustain serious damage in the event of a collision with a larger automobile. Finally, the evidence in the present case indicates as mentioned above that the Defendants' vehicle was manufac-

> tured in accordance with all applicable United States Government standards. Under these circumstances, the conduct of the Defendant Honda cannot be said to fall within the ambit of those activities which under Florida law justify an award of punitive damages.

The basis for the district judge's judgment n. o. v. respecting punitive damages thus seems to be that a finding of recklessness was foreclosed as a matter of law because the basic safety problem was the vehicle's diminutive size and because the vehicle complied with federal Motor Vehicle Safety Regulations. Additionally, Honda argues that Florida would not permit punitive damages in a products liability case. We conclude that the district court erred in setting aside the award of punitive damages.

Diminutive size. Certainly the AN 600's diminutive size compared to a "standard" American vehicle was "obvious on casual examination." Dorsey acknowledged that he had bought the car because it was economical (and impliedly it was economical because small) and the he knew it might be severely damaged in a collision with a "standard size" car. The district court reasoned that the manufacturer could not be liable in damages for designing and selling a diminutive car to one who desired it because it was diminutive and who knew the risks from collision that were attendant to its size. The flaw in this reasoning, so far as this case is concerned, is the district court's characterization of the plaintiffs' claims as "basically" that the diminutive size of the AN 600 was so far different from the size of a standard American vehicle that the AN 600 was unsafe in a collision.

[2] The district court's cryptic holding presumably draws on the "crashworthiness" decisions which, speaking generally, interpret the extent of the automobile manufacturer's duty to design a vehicle that protects its occupants from injury in collisions not caused by a defect in the vehicle. Florida imposes on the automobile manufacturer a duty to use reasonable care to design and manufacture a vehicle that eliminates unreasonable risk of foreseeable injury to the occupants in the event of a collision. *Ford Motor Co.* v. *Evancho*, 327 So.2d 201 (Fla. 1976) (adopting the reasoning of *Larsen* v. *General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968)). The district court seemed to reason that the manufacturer does not violate this duty of

care when the design feature that poses a risk of injury should a collision occur (here the size of the car, according to the district court), is obvious, useful, and indeed intentionally selected by the purchaser, *see Dreisonstok* v. *Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974) (Virginia law). In *Dreisonstok*, the Fourth Circuit assumed that Virginia would adopt the "crashworthiness" rule of *Larsen* v. *General Motors, supra*, but held that the manufacturer did not violate any duty of ordinary care by designing a van that achieved the unique feature of maximum cargo space by advancing the driver's seat as far forward as possible, thereby eliminating the protection afforded passengers in a conventional car who are "in the middle of the vehicle" protected by the engine and hood in front of them.

Reliance on *Dreisonstok* is based on a misconception of the plaintiffs' case. The plaintiffs' challenge is not directed to the AN 600's diminutive size but to design features other than the size of the vehicle.

[3] There was evidence sufficient for the jury to find causal factors of injury other than size of the vehicle. The evidence supported a conclusion that although this was a relatively moderate collision the A pillar deformed inward and Dorsey's seat assembly broke lose from its moorings and jammed him forward, which fractured his legs and impelled his head against the deformed A pillar. The safety of the seat assembly has no necessary relation to the size of the car. Nor was the A pillar's deformation necessarily related to the size of the car. Reinforcing the car with metal bones would not require increasing the size of the car, nor would changing the frame design or installing a larger engine. There was evidence that Honda used lighter gauge metal than some other small car manufacturers, which again is unrelated to size. Finally, the jury could find that the seat belts were unduly elastic in comparison to the small size of the passenger compartment, permitting excess frontward movement before restraining the user, and that less elastic materials were available. Adopting a different seat belt material would not require enlarging the car. In short, Dorsey's experts identified several deficiencies unrelated to size. Dorsey's willingness to buy a car with a small passenger

compartment is not a willingness to be supplied with a passenger compartment that is negligently designed or defectively constructed.

We thus do not need to decide whether and to what extent Florida would adopt *Dreisonstok*.[5] That case only involved a contention that one structural configuration should have been chosen over another. Moreover, "[t]here was no evidence in the record that there was any practical way of improving the 'crashability' of the vehicle that would have been consistent with the peculiar purposes of its design." 489 F.2d at 1074. In the case before us more is involved than choosing a small car over one of "standard" size. There is substantial evidence that tests carried out by Honda demonstrated that, apart from being small, the AN 600 had serious design deficiencies creating unreasonable risk of harm to passengers. Moreover, there was testimony, some of it from Honda's own engineers, that there were practical ways of improving its "crashability" that would have been consistent with the "peculiar purposes of its design," diminutive size.

The foregoing evidence was submitted to the jury under unexceptionable instructions governing willful and wanton conduct. The jury found wantonness, willfulness or reckless indifference to the rights of others. Under *Boeing Co.* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), the evidence permitted the jury to reach this conclusion.

Compliance with government standards. The district court determined that compliance with federal safety standards precluded an award of punitive damages. Reliance upon this argument is questionable because Honda did not articulate the compliance argument in its motion for directed verdict, offered no jury instruction on the point, and at the charge conference told the court that it did not contend that compliance with the federal safety standards proved it did not do anything wrong. However, it seems that the court concluded that compliance with these standards negates recklessness as a matter of law. We disagree.

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[5] *Nicolodi* v. *Harley-Davidson Motor Co.*, 370 So.2d 68 (Fla.Dist.-Ct.App. 1979), held that the crashworthiness doctrine applies to motorcycles, reversing a trial court's dismissal of a complaint alleging that a motorcycle should have been designed to protect a passenger's legs from injury in a collision.

As an initial matter we note that 15 U.S.C. § 1397(c) provides that compliance with the federal regulations "does not exempt any person from any liability under common law." Honda cites no support for its contention that liability under common law does not mean liability for punitive damages under common law. We do not rest our decision on this statute, however, because the purpose of § 1397(c) may be to disclaim any intent to preempt state common law theories of product liability in the automotive design area rather than to mandate that the factfinder in a common law action may not consider compliance as evidence of care if state law permits that argument. *Cf.* S.Rep. 1301, 89th Cong., 2d Sess., *reprinted in* [1966] U.S.Code Cong. & Ad.News 2709, 2720.

[4] Generally speaking, compliance with regulatory standards may be admissible on the issue of care but does not require a jury to find a defendant's conduct reasonable. *See* Restatement (Second) of Torts § 288C; W. Prosser, Handbook of the Law of Torts § 36 at 203-04 (4th ed. 1971); *Bruce* v. *Martin-Marietta Corp.*, 544 F.2d 442, 446 (10th Cir. 1976) (Maryland law); *Salmon* v. *Parke, Davis & Co.*, 520 F.2d 1359, 1362 (4th Cir. 1975) (North Carolina law); *Raymond* v. *Riegel Textile Corp.*, 484 F.2d 1025, 1027 (1st Cir. 1973) (New Hampshire law). Honda offers no persuasive reason why compliance will as a matter of law be merely admissible on the issue of whether the defendant's conduct is reasonable but an absolute defense on the issue of whether its conduct is willful, reckless, or outrageous. *See Silkwood* v. *Kerr-McGee Corp.*, 485 F.Supp. 566, 583-86 (W.D.Okl. 1979) (compliance with federal standards does not prevent awarding punitive damages if the defendant's conduct is reckless); *Gryc* v. *Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921, 101 S.Ct. 320, 66 L.Ed.2d 149 (1980).

[5] Moreover, the federal Motor Vehicle Safety Act Standards are unrelated to several of the design deficiencies developed by the plaintiffs' evidence. The district judge's opinion presumably refers to evidence of compliance with MVSS 204, governing displacement of the steering wheel, MVSS 207, governing strength of the seat assembly, MVSS 209, governing the strength and elasticity of the seat belts, MVSS 210, governing seat belt assembly anchorages, and MVSS 301, governing vulnerability of the fuel tank. While the regulations governing seats and seat belts are relevant to portions of

the plaintiffs' case, none of the regulations applicable to Dorsey's car governed the strength of the A pillar or the overall ability of the passenger compartment to protect occupants in a crash.* Furthermore, plaintiffs' expert explained that compliance with the standard governing seat belt stretch would be meaningless in terms of safety if the car was designed to place the driver's head so close to the front of the passenger compartment that it would be vulnerable in a crash. In short, we believe that Florida would not hold as a matter of law that compliance with the applicable regulations, which were far from comprehensive, precluded any finding of recklessness no matter how egregious Honda's conduct had been in ignoring tests that indicated design flaws of a different nature.

[6] *Propriety of punitive damages in a products liability case.* Finally, Honda urges that punitive damages are not available in this case because liability in a "products liability" case is predicated on the nature of the product and not on the character of the defendant's actions, whereas in assessing punitive damages the character of the act is paramount. This is not a pure negligent design case or a pure products liability case based on no more than a theory of strict liability. The evidence permitted the jury to find that defendant knew that it was creating unreasonable risks not necessarily incident to the unique design desired by the purchaser and received recommendations for eliminating or minimizing these unreasonable risks but did not accept them. The jury not only returned separate special verdicts against the defendant on strict liability, implied warranty, negligent design, and negligent failure to warn, but also returned a finding that Honda had acted with "wantonness, willfulness or reckless indifference to the rights of others." The punitive damage award is thus based directly upon the nature of Honda's conduct. Thus we do not face whether Florida would permit punitive damages in a so-called "products liability" case where the defendant was guilty of only negligent design or where liability was based solely upon strict liability in tort.

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* MVSS 208, a test governing the passenger compartment's overall ability to protect passengers in a crash, did not apply to automobiles manufactured prior to January 1, 1972. *See* C.F.R. § 571.208. Dorsey's car was manufactured June 11, 1971.

Honda further contends that because there are no Florida products liability cases awarding punitive damages Florida, "by negative implication," would deny punitive damages in this type of case. The Florida opinions that Honda cites do not indicate that punitive damages had been sought. *See West* v. *Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976); *Ford Motor Co.* v. *Evancho*, 327 So.2d 201 (Fla. 1976); *Tampa Drug Co.* v. *Wait*, 103 So.2d 603 (Fla. 1958); *Nicolodi* v. *Harley-Davidson Motor Co.*, 370 So.2d 68 (Fla. Dist. Ct. App. 1979); *Sansing* v. *Firestone Tire & Rubber Co.*, 354 So.2d 895 (Fla. Dist. Ct. App.), *cert. denied*, 360 So.2d 1250 (Fla. 1978); *Clement* v. *Rousselle Corp.*, 372 So.2d 1156 (Fla. Dist. Ct. App. 1979), *cert. denied*, 383 So.2d 1191 (Fla. 1980). Those cases therefore do not appear to address the questions.[7]

We believe that Florida would permit punitive damages in this case. For nearly a century it has been recognized in Florida that punitive damages may be awarded when, inter alia, the defendant's conduct shows wantonness or recklessness or reckless indifference to the rights of others, *Florida Southern Railway* v. *Hirst*, 30 Fla. 1, 11 So. 506 (1892). Florida courts have permitted punitive damages in a wide range of tort cases where the plaintiff establishes such conduct. *See, e.g., Ingram* v. *Pettit*, 340 So.2d 922 (Fla. 1976) (injuries caused by intoxicated driver); *Campbell* v. *Government Employees Insurance Co.*, 306 So.2d 525 (Fla. 1974) (insurer's refusal to settle claim); *Buie* v. *Barnett First National Bank of Jacksonville*, 266 So.2d 657 (Fla. 1972) (bank wrongfully repossessed plaintiff's automobile); *La Porte* v. *Associated Independents, Inc.*, 163 So.2d 267 (Fla. 1964) (employee threw garbage can at plaintiff's dog, killing it);

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[7] While no Florida decision squarely addresses the availability of punitive damages as a general matter in products liability litigation, dictum in *Campbell* v. *Government Employees Insurance Co.*, 306 So.2d 525, 531 (Fla. 1974), noted the thalidomide drug cases in illustrating the range of cases in which courts have awarded punitive damages. *Auto Specialities Manufacturing Co.* v. *Boutwell*, 335 So.2d 291 (Fla.Dist.Ct.App.), *cert. dismissed*, 341 So.2d 1080 (Fla. 1976), upheld a trial judge's decision to set aside a jury verdict for punitive damages in a products liability case because there was insufficient evidence of recklessness without questioning the broader propriety of punitive damages were recklessness established.

Ocean Mile Galleries, Inc. v. *Huguenor*, 351 So.2d 1043 (Fla. Dist. Ct. App. 1977) (misrepresentations in sale of jewelry); *Doral Country Club, Inc.* v. *Lindgren Plumbing Co.*, 175 So.2d 570 (Fla. Dist. Ct. App.) (conversion of plumbing supplies), *cert. denied*, 179 So.2d 212 (Fla. 1965). *Cf. ABC-Paramount Records, Inc.* v. *Topps Record Distributing Co.*, 374 F.2d 455 (5th Cir. 1967) (Florida law; wrongful interference with contractual relationship). Punishment and deterrence, the basis for punitive damages in Florida as elsewhere, *see Campbell*, 306 So.2d at 531, are no less appropriate with respect to a product manufacturer who knowingly ignores safety deficiencies in its product that may endanger human life than in the cases described above. [8]

Many other jurisdictions have permitted punitive damages in products liability cases upon a proper showing of outrageous or reckless conduct. *See Gillham* v. *Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975) (Ohio law), *cert. denied*, 424 U.S. 913, 96 S.Ct. 1113, 47 L.Ed.2d 318 (1976); *Hoffman* v. *Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973) (Pennsylvania law); *Grimshaw* v. *Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981); *petitions for hearing filed*, (Cal. July 7, 1981); *Leichtamer* v. *American Motors Corp.*, No. 5223 (Ohio Ct. App. July 30, 1980) (awarding punitive damages

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[8] The conclusion that we have reached is reinforced by a decision of the Florida Court of Appeals handed down since the preparation of this opinion. *American Motors Corporation* v. *Ellis*, 403 So.2d 459, 6 Fla.Law Weekly, 1808 (Fla.Ct. of App., 5th District, 8/14/81). Plaintiffs contended that the manufacturer of their automobile acted with knowledge and reckless indifference to the rights and safety of others with respect to the design of the gasoline tank. The trial court granted a directed verdict against plaintiffs on their claim for punitive damages. The Court of Appeals reversed, holding that the jury could have found that the manufacturer was aware of the catastrophic results of fuel tank fires in its vehicle from its own crash tests and chose not to implement the recommendations of its engineers to relocate the fuel tank. While there was evidence that the choice to retain the location was a valid business judgment the jury could reasonably infer that the manufacturer was aware that the fuel tank was defective and dangerous but chose not to seek a safer alternative design. In view of this available inference the directed verdict was error and a new trial on punitive damages was required.

in a "crashworthiness" case), *affirmed*, 424 N.E.2d 568 (Ohio 1981); *Wangen* v. *Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, 444 (1980) (awarding punitive damages in a "crashworthiness" case); *Wussow* v. *Commercial Mechanisms, Inc.*, 97 Wis.2d 136, 293 N.W.2d 897 (1980); *Vollert* v. *Summa Corp.*, 389 F.Supp. 1348 (D. Hawaii 1975); *Drake* v. *Wham-O Manufacturing Co.*, 373 F.Supp. 608 (E.D.Wis. 1974); *Gryc* v. *Dayton-Hudson Corp.*, 297 N.W.2d 727, 732-33 (Minn.), *cert. denied*, 449 U.S. 921, 101 S.Ct. 320, 66 L.Ed.2d 149 (1980); *Sturm, Ruger & Co.* v. *Day.*, 594 P.2d 38, 46-47 (Alaska 1979); *Toole* v. *Richardson-Merrell Inc.*, 251 Cal.App.2d 689, 60 Cal.Rptr. 398 (1967); *Moore* v. *Jewel Tea Co.*, 116 Ill. App.2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill.2d 288, 263 N.E.2d 103 (1970); *Rinker* v. *Ford Motor Co.*, 567 S.W.2d 655, 668-69 (Mo.App. 1978). *Cf. American Laundry Machinery Industries* v. *Horan*, 45 Md.App. 97, 412 A.2d 407, 419-20 (Md.Ct.-Spec.App. 1980) (punitive damages available in products liability action upon sufficient showing of recklessness, but finding insufficient evidence of recklessness).

IV. LIABILITY OF CONTINENTAL CASUALTY

Continental is a participant in a complicated and sophisticated insurance program involving several layers or levels of primary and excess insurance. It is the liability insurer covering Honda for losses in excess of coverage provided by underlying policies with other insurers. Continental acknowledges that it is the insurer responsible for covering the punitive damage award.

The remaining issue concerns whether Florida's public policy that one may not insure against punitive damages precludes a finding that Continental is liable under its policy for the punitive damages awarded against Honda. The key to this question is whether Honda's liability for punitive damages is premised on its own fault or is merely vicarious.

[7] Honda's initial argument is procedural. It contends that Continental's failure specifically to plead illegality as an affirmative defense under Rule 8(c) foreclosed any consideration of the coverage issue. With this we disagree. The pleadings sufficed to raise in-

surance coverage as an issue in the case. The plaintiffs claimed compensatory damages and asserted the liability policy as the basis for Continental's joinder in the action and its potential liability. By an amended complaint plaintiffs requested punitive damages as well. We agree with the district court that Continental was not required to plead a conclusion of law to the effect that it might be liable to cover compensatory damages if awarded but not punitive damages.

[8] Continental's failure to request from the jury a special verdict concerning the coverage issue did not foreclose it from requesting the trial judge to determine the issue in post-trial proceedings. Under Rule 49, if the jury's special verdicts do not cover an issue of fact raised by the pleadings, the remaining issue is for the judge to determine. The trial judge correctly proceeded to determine the issue of coverage.

[9, 10] We are not able, however, to affirm the trial judge's determination that as a matter of fact and law Florida's public policy forbids insurance coverage of the punitive damages awarded against Honda. The basic rule of Florida law is that public policy forbids insurance coverage of punitive damages in order that the punitive and deterrent purposes of these damages will not be thwarted. *Northwestern National Casualty Co.* v. *McNulty*, 307 F.2d 432 (5th Cir. 1962); *Nicholson* v. *American Fire & Casualty Insurance Co.*, 177 So.2d 52 (Fla.Dist.Ct.App. 1965). Florida's intermediate appellate courts, however, have permitted insurance coverage of punitive damages where the insured party was not itself at fault but was merely vicariously liable for punitive damages based on the reckless conduct of another. *See Hartford Accident & Indemnity Co.* v. *U.S. Concrete Pipe Co.*, 369 So.2d 451, 452-53 (Fla.Dist.Ct.App. 1979) (respondeat superior); *Travelers Insurance Co.* v. *Wilson*, 261 So.2d 545 (Fla.Dist.Ct.App. 1972); *Sterling Insurance Co.* v. *Hughes*, 187 So.2d 898 (Fla.Dist.Ct.App.) (respondeat superior), *cert. denied*, 194 So.2d 622 (Fla. 1966). Honda's post-trial argument contended: any recklessness proved by the plaintiff was that of Honda R&D, the wholly owned subsidiary, rather than of Honda Motor, the defendant; punitive damages were therefore awarded against Honda Motor on a theory of vicarious liability; insurance coverage was therefore permissible.

The district court accepted these legal premises but ruled that the policy of *Northwestern National Casualty Co.* v. *McNulty* forbade insurance coverage on the facts of this case:

> In the present case, Honda's liability arose out of the adoption of a particular automotive design and the sale of its product manufactured under same. This conduct could not be deemed passive under any view of the evidence or the exception to the *McNulty* policy developed by Florida appellate courts. On the present record, the reasons for the *McNulty* policy clearly apply and any liability for punitive damages arising out of the present case many not be imposed on the insurance company defendants.

The reference to "adoption" of a design by Honda and subsequent manufacture and sale under this design seems to us to refer to conduct by Honda itself as opposed to conduct of employees of Honda R&D. The description of this conduct — adoption, manufacture and sale — as not "passive" implies that liability of Honda arose out of its own "active" (and faulty) conduct as opposed to vicarious liability because of acts done by Honda R&D.

Thus construed the order is not supported by the evidence. The substantial evidence of conduct willful, wanton, or in reckless disregard of the rights of others concerns actions and failures of Honda R&D and its employees. Neither Continental nor the district court points us to substantial evidence that any responsible person of Honda was reckless or even that any such person had knowledge of the results of the tests conducted by Honda R&D or of the recommendations of Honda R&D employees that the design of the AN 600 be changed. The liability of Honda is, therefore, not based upon its own acts but upon those of Honda R&D and its employees, for which Honda in the pre-trial order, accepted responsibility. Absent the pre-trial order, plaintiffs would have been required to prove the existence of a relationship between Honda and Honda R&D that would make Honda responsible for acts of Honda R&D and its employees. There was not such proof.

This takes us to the issue of whether, in the absence of such proof, the pre-trial order, joined in by Continental, operates to establish the existence of a relationship that is either within, or without, the vicarious liability exception to Florida's policy that one may not

insure against punitive damages. It may be contended that the pretrial order is an acceptance by Honda of vicarious responsibility for acts of Honda R&D and its employees. Also it can be argued that the order is merely a recognition by Honda that Honda R&D is a "mere instrumentality" of Honda. *See Bendix Home Systems, Inc.* v. *Hurston Enterprises, Inc.*, 566 F.2d 1039, 1041 (5th Cir. 1978) (Fla. law); *St. Petersburg Sheraton Corp.* v. *Stuart*, 242 So.2d 185, 190 (Fla.Dist.Ct.App. 1970). *Cf. Markow* v. *Alcock*, 356 F.2d 194, 197-98 (5th Cir. 1966); Annot., 7 A.L.R.3d 1343 (1966). Evidence concerning the relationship between parent and subsidiary was skimpily developed at trial. The record discloses that Honda R&D is a wholly owned subsidiary of Honda and that the current chief engineer of Honda R&D testified, regarding the function of the laboratory he directs, that "to Honda Companies which manufacture cars, we sell blueprints." It is not beyond possibility that Honda accepted responsibility for Honda R&D's acts as a tactical matter or because it did not want the relationship between the two companies publicly aired, but we find nothing in the record on these possibilities.

Determination of the Honda-Honda R&D relationship, and of the consequences of it under the vicarious liability exception to the Florida policy against insuring against punitive damages, must be addressed by the district court in the light of this opinion. We note Florida cases addressing an insurance company's liability for punitive damages in the face of an equivocal verdict. *See Morrison* v. *Hugger*, 369 So.2d 614 (Fla.Dist.Ct.App. 1979), holding that if it is not possible to tell whether a jury rendered its verdict on a vicarious liability theory or another theory the insurer is responsible for punitive damages. The applicability of these cases is for the district court in the first instance.

AFFIRMED in part, REVERSED in part, and REMANDED with directions to reinstate the punitive damages award in favor of plaintiff Glen K. Dorsey, Jr. and for further proceedings not inconsistent with this opinion.

GLEN K. DORSEY, JR. and Barbara J. Dorsey, his wife,
Plaintiffs-Appellants Cross-Appellees,

v.

HONDA MOTOR COMPANY LTD. *et al.*,
Defendants-Appellees-Cross Appellants.

HONDA MOTOR COMPANY LTD.,
Defendant-Appellant-Cross Appellee,

v.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellee-Cross-Appellant.

No. 79-3845.

United States Court Of Appeals,
Fifth Circuit.*
Unit B

March 8, 1982.

Frates, Floyd, Pearson, Stewart, Richman & Greer, Gary D. Fox, Larry S. Stewart, Miami, Fla., for the Dorseys.

Anthony M. Lanzone & Associates, Anthony M. Lanzone, Robert A. Calinoff, New York City, DeWolf, Ward, Morris, Wohlust, Jontz & O'Donnell, John L. O'Donnell, Jr., Thomas B. DeWolf, Orlando, Fla., for Honda Motor Co. Ltd.

Akerman, Senterfitt & Eidson, John Edwin Fisher, Orlando, Fla., for Continental Cas. Co.

Joe N. Unger, Miami, Fla., for Honda Motor Co. Ltd., American Honda Motor and Mission Ins.

Appeals from the United States District Court for the Middle District of Florida.

*Former Fifth Circuit case, Section 9(3) of Public Law 96-452 — October 14, 1980.

Before GODBOLD, Chief Judge, MORGAN and HENDERSON, Circuit Judges.

ON PETITIONS FOR REHEARING PER CURIAM:

[1] Pending this appeal and a few days before the case was argued to us, the Supreme Court of Florida decided *Mercury Motors Express, Inc.* v. *Smith*, 393 So.2d 545 (Fla. 1981) in which the court said that before an employer may be held vicariously liable for punitive damages under the doctrine of respondeat superior, there must be "some fault" on the employer's part. [1]

Relying upon *Mercury Motors*, Honda urges by petition for rehearing that it cannot be held liable in punitive damages for acts done by Honda R&D because, it says, our opinion excludes the possibility that Honda was guilty of "some fault" of its own. Continental Casualty has also petitioned for rehearing, contending that *Mercury Motors* abolished Florida's vicarious liability exception to no insurance coverage for punitive damages.

[2] As we pointed out in our opinion, 655 F.2d 650 (5th Cir. 1981), by the pretrial stipulation Honda accepted that in legal effect the acts of Honda R&D and its employees were its own acts. Honda cannot escape the consequences of this pretrial acceptance of responsibility via the escape hatch of *Mercury Motors*. The issues having been drawn in this manner in the pretrial order, at trial the distinction between Honda and Honda R&D was blurred, and presumably no party saw any necessity of distinguishing clearly between what Honda did and what Honda R&D did. In the record it is often hard to tell which one of the family of Honda companies was being described, and no one treated such distinction as a matter of particular consequence. The case having been tried as laid out in the pretrial order, it is too late for Honda to say post-trial that there was insufficient evidence of its own fault independent of acts of Honda R&D and its employees to support the judgment against it for punitive damages.

---

[1] Although the misconduct of the employee upon which the vicarious liability is based must be willful and wanton, the fault of the employer, independent of the employee's conduct, need be only "some fault" contributing to the plaintiff's injury. *Id.*

We therefore adhere to our holding that the court erred in setting aside the punitive damages award on motion for judgment n. o. v.

We modify our opinion by deleting that portion beginning near the botton of 655 F.2d 659, with the words "The district court accepted these legal premises . . ." and continuing through the rest of the opinion. We vacate the second judgment of the district court in which it held Continental was not liable to Honda for the punitive damages award and remand the case to the district court for it to determine afresh whether under the facts of this case and under Florida law Continental is liable to Honda.

The petitions for rehearing are DENIED.

AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED with directions to reinstate the punitive damages award in favor of plaintiff Glen K. Dorsey, Jr. and for further proceedings not inconsistent with this opinion.

GLEN K. DORSEY, JR. and Barbara J. Dorsey, his wife,
Plaintiffs-Appellants, Cross-Appellees,

v.

HONDA MOTOR COMPANY LTD. *et al.*,
Defendants-Appellees, Cross Appellants.

HONDA MOTOR COMPANY LTD.,
Defendant-Appellant,

v.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellee, Cross-Appellant.

No. 79-3845.

United States Court Of Appeals,
Fifth Circuit.*
Unit B

April 30, 1982.

Frates, Floyd, Pearson, Stewart, Richman & Greer, Gary D. Fox, Larry S. Stewart, Miami, Fla., for the Glen and Barbara Dorsey.

Anthony M. Lanzone & Associates, Anthony M. Lanzone, Robert A. Calinoff, New York City, for Honda Motor Co., Ltd. and American Honda Motor Co.

DeWolf, Ward, Morris, Wohlust, Jontz & O'Donnell, John L. O'Donnell, Jr., Thomas B. DeWolf, Orlando, Fla., for Honda Motor Co., Ltd.

Akerman, Senterfitt & Eidson, John Edwin Fisher, Orlando, Fla., for Continental Cas. Co.

*Former Fifth Circuit case, Section 9(3) of Public Law 96-452 — October 14, 1980.

Joe N. Unger, Miami, Fla., for Honda Motor Co., Ltd., American Honda Motor and Mission Ins.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, MORGAN and HENDERSON, Circuit Judges.

BY THE COURT:

The motion of the Dorseys that we qualify our mandate to provide for interest from the date of the original judgment, 5 Cir., 655 F.2d 650, with respect to both compensatory and punitive damages is GRANTED.

The liability of Continental to Honda for the punitive damages award is an issue for the district court on remand. If Continental is held liable to Honda, the district court should also decide whether Continental's liability includes the award of interest.

Honda's motion for taxation of costs against Continental is GRANTED.

The motion of the Dorseys to strike the petition for rehearing en banc filed by Honda is DENIED.

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc filed by Honda is DENIED.

The motion of Honda for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 76-388-Orl-Civ-R

GLEN K. DORSEY, JR. and BARBARA J. DORSEY, his wife,
Plaintiffs,

v.

HONDA MOTOR COMPANY, LTD., *et al.*,
Defendants.

FILED
ORLANDO, FLA.
NOV 2 1979
WESLEY R. THIES
CLERK

MEMORANDUM OF DECISION

On 25 October 1979, the court heard oral argument on the following:

1. Defendants' *Motion To Set Aside Verdict And Enter Judgment In Accordance With Defendants' Motions For Directed Verdict*, and *Alternative Motions For Remittitur* and *For New Trial*, filed 6 July 1979.

2. Defendants' *Motion To Alter Or Amend Judgment*, filed 6 July 1979.

3. Plaintiffs' *Motion For Entry Of Judgment Against Party Defendants*, filed 6 September 1979.

4. Defendant Continental Casualty Company's *Motion To Limit Liability*, filed 19 October 1979.

5. Defendant Continental Casualty Company's *Motion To Dismiss And Vacate Judgment And Alternative Motion For Rehearing*, filed 25 October 1979.

With regard to the Defendants' motion to set aside the verdict and enter judgment in accordance with their motions for directed verdict, the evidence considered most favorably for the Plaintiffs indicates the following. In the mid-1960's, the Defendant Honda Motor Company, Ltd. (hereafter referred to as "Honda") developed, a small, lightweight automobile which it ultimately manufactured and exported to the United States and Europe to meet the demand in those countries for a low-priced automobile economical to operate. The vehicle which was sold in the United States was called a Honda AN600. It weighed approximately 1356 pounds. Its counterpart exported for sale to the European market was designated as a Honda N600 and weighed approximately 1216 pounds.

The testing of the prototype vehicles was conducted in Japan by employees of Honda R&D Ltd., a wholly owned subsidiary of the Defendant Honda. The testing of the prototypes revealed that a dummy properly restrained by seat and shoulder belts would hit the interior front parts of the passenger compartment when the vehicle was involved in a head-on collision with a standard size American vehicle under conditions sufficient to generate the impact of a thirty mile an hour barrier crash. Despite this knowledge and a recommendation by an employee of Honda R&D Ltd. to enlarge the vehicle (PX 31), the Defendant Honda in 1970 began to export the AN600 for sale in the United States without increasing the vehicle's size or body strength or warning purchasers of its crash characteristics.

As mentioned above, the AN600 weighed approximately 1356 pounds. By way of comparison, a full size American vehicle such as that with which Mr. Dorsey collided weighs about 3600 pounds. On the AN600 the distance from the left "A" pillar to the driver's head was about thirteen inches. On a standard size American vehicle the comparable distance is about twenty inches.

The Plaintiff, Mr. Dorsey, bought a new Honda AN600 early in 1972. He chose the vehicle because he desired an automobile which offered economy in operation. He testified that the vehicle was comfortable and provided him adequate head room. The vehicle came equipped with a lap and shoulder belt and a steering wheel designed to give way to the left in the event of a front-end collision.

Mr. Dorsey testifed he was unaware of the crash characteristics of the car, but realized the vehicle could sustain severe damage in the event of a collision with a standard size American automobile.

On 9 March 1972, while Mr. Dorsey was driving his AN600 in a northerly direction through an intersection at approximately thirty miles an hour, the vehicle was struck by a standard size Ford which approached from Mr. Dorsey's left. As a result of the impact, the seat in Mr. Dorsey's vehicle moved forward and to the left and the "A" pillar on the left side was deformed rearward approximately thirteen inches. Mr. Dorsey, although wearing his seat and shoulder belt, struck some part of the interior of the passenger compartment and received serious permanent injury.

A post-accident examination of the AN600 by one of the Plaintiffs' expert witnesses, Mr. James McElhaney, led him to conclude that the Plaintiffs' vehicle met all applicable standards promulgated by the United States Department of Transportation.

It is the opinion of the court that under the law of the case, a jury acting reasonably could have disagreed as to whether or not the Defendants Honda and American Honda Motor Company, Inc. were liable for compensatory damages. However, it is the conclusion of the undersigned that a jury acting reasonably could not have found liability for punitive damages. *Wansor* v. *George Hantscho Co. Inc.*, CA5, 1978, 570 F.2d 1202. The court will, therefore, grant the motion for a directed verdict on the punitive damage claim.

Crash characteristics as a basis for tort liability have only recently been recognized in the law of Florida. See *Ford Motor Company* v. *Evancho*, Fla. 1976, 327 So.2d 201. No Florida cases allowing punitive damages arising from a failure to adopt a particular automotive design or warn of its crash characteristics have been cited to the court. The general principles of Florida law on punitive damages, however, are clear. Punitive damages are not intended to compensate an injured person. Rather, the award of punitive damages is to punish a defendant and deter others. See *Winn & Lovett Grocery Co.* v. *Archer*, Fla. 1936, 171 So. 214, 221. As a consequence, punitive

damages are awarded in a very limited range of civil cases. In the *Winn & Lovett* case, supra, the court at page 221 said:

> ". . . Exemplary damages are given solely as a punishment where torts are committed with fraud, actual malice, or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. Exemplary or punitive damages are therefore damages ultra compensation, and are authorized to be inflicted when the wrong done partakes of a criminal character, though not punishable as an offense against the state, or consists of aggravated misconduct or a lawless act resulting in injury to plaintiff when sought to be redressed by a civil action for the tort. . . ."

See also *Auto Specialists Mfg. Company* v. *Boutwell*, Fla. App. 1976, 335 So.2d 291, where the trial court was held to have correctly directed a verdict on the plaintiff's claim for punitive damages where the manufacturer of a hydraulic jack was apparently shown to have been aware of the explosive characteristics of the jack.

In the present case, it was basically the diminutive size of the Defendants' product and the difference between its size and that of standard American vehicles which rendered the Defendants' vehicle unsafe in the event of a collision. See the testimony of James McElhaney, Plaintiffs' expert. This source of potential harm, however, was obvious on casual observation. Mr. Dorsey recognized when he bought the automobile that it could sustain serious damage in the event of a collision with a larger automobile. Finally, the evidence in the present case indicates as mentioned above that the Defendants' vehicle was manufactured in accordance with all applicable United States Government standards. Under these circumstances, the conduct of the Defendant Honda cannot be said to fall within the ambit of those activities which under Florida law justify an award of punitive damages.

With respect to the Defendants' alternative motions for remittitur and new trial, suffice it to say that the court has considered the same and found them to be without merit. The primary authorities relied on by the court in the preparation of its jury charges on the liability aspect of the care are the following: *Smith* v. *Fiat-Roosevelt Motors, Inc.*,

CA5, 1977, 556 F.2d 728; *Tampa Drug Co.* v. *Wait*, Fla. 1958, 103 So.2d 603; *McCullough* v. *Beech Aircraft Corp.*, CA5, 1979, 587 F.2d 754; *West* v. *Caterpillar Tractor Co., Inc.*, Fla. 1976, 336 So.2d 80; *Ford Motor Co.* v. *Evancho*, Fla. 1976, 327 So.2d 201, and *Nicolodi* v. *Harley-Davidson Motor Co., Inc.*, Fla. App. 1979, ___ So.2d ___.

With respect to the Defendants' motion to alter or amend the judgment, Defendants have correctly pointed out that the court erred in entering a judgment against American Honda Motor Company, Inc. for punitive damages. This was inconsistent with the jury verdict and is subject to correction under Rule 60, Federal Rules of Civil Procedure. On the other aspect of the motion to alter or amend the judgment, the Plaintiffs and Defendants have stipulated that the Defendants will be entitled to a $9,000.00 credit against the judgment in favor of Mr. Dorsey and a $1,000.00 credit against the judgment in favor of Mrs. Dorsey by reason of $10,000.00 paid the Plaintiffs on behalf of a third party.

The Plaintiffs on 6 September 1979 filed their motion for entry of judgment against the insurance company defendants who were made parties to the litigation. In response thereto, the Defendant Continental Casualty Company filed on 19 October 1979 a motion to limit liability. At the hearing on these motions, counsel for all parties agreed to attempt to stipulate on the extent to which each insurance company would be liable for the judgment for compensatory damages. In the event the parties are unable to enter into such a stipulation within fifteen days from the date of this Memorandum of Decision, counsel for the Plaintiffs shall so advise the court and the court will set a further hearing at which testimony will be taken to determine the amount of the unexhausted limits of the policies covering the liability of the primary defendants. The court finds, however, no just reason for delay in the entry of judgment against Defendants Honda and American Honda Motor Company, Inc. and will direct the entry of a judgment against those Defendants pursuant to Rule 54(b), Federal Rules of Civil Procedure.

At the hearing on the aforesaid motions, the Defendant Honda argued that the judgment against the insurance company defendants

should include the punitive damages assessed by the jury. While this issue is mooted by the court's ruling on the motion for a directed verdict, because of the possibility of appellate review, economy of judicial labor may be advanced by this court expressing its opinion on the issue.

As announced in *Northwestern National Casualty Company* v. *McNulty*, CA5, 1962, 307 F.2d 432, it is contrary to the public policy of the State of Florida to enforce a liability policy under the law of the State of Florida with respect to punitive damages. While this remains the public policy of Florida, intermediate appellate courts of Florida have not applied the policy to situations where the purpose for the policy would not be served. These are situations in which the insured was guilty of no active negligence, but simply was liable by reason of ownership or the misconduct of a low level employee. See *Travelers Insurance Company* v. *Wilson*, Fla. App. 1972, 261 So.2d 545, and *Hartford Accident & Indemnity Company* v. *U.S. Concrete Pipe*, Fla. App. 1979, 369 So.2d 451, and authorities therein cited.

Independent counsel for Honda made an appearance after the verdict. He argued at the hearing on the post-trial motions that the jury should have been asked to resolve the punitive damage coverage question. This argument is without merit because it misconceives the very nature of the case. In the present case, Honda's liability arose out of the adoption of a particular automotive design and the sale of its product manufactured under same. This conduct could not be deemed passive under any view of the evidence or the exception to the *McNulty* policy developed by Florida appellate courts. On the present record, the reasons for the *McNulty* policy clearly apply and any liability for punitive damages arising out of the present case may not be imposed on the insurance company defendants.

Next independent counsel for Defendant Honda argues that the insurance company defendants waived the right to limit liability by not pleading the lack of punitive damage coverage. This argument is without merit. The coverage issue was raised by the Plaintiffs' pleading which affirmatively alleged a claim for punitive damage and the insurance contracts as a basis for the insurance company defendants' liability and joinder in the action. Given these allegations,

there was no need for the insurance companies to plead a conclusion of law by way of a defense.

Finally, independent counsel for Honda argues that a conflict of interest arose by reason of the fact that the insurance companies (with the exception of Continental Casualty Company) continued to defend the action after the claim for punitive damages was injected into the litigation by the amendment to the Third Amended Complaint. If there is any factual and legal merit to this contention, Honda's remedy would be by a separate action for damages since coverage for punitive damages cannot be created by estoppel or waiver or even an express contractual intent. See *Northwestern National Casualty Company* v. *McNulty*, supra, where the court at page 442 states:

> ". . . Consistency compels us to hold, however, that since public policy forbids an insurer and an insured to enter into an insurance contract covering punitive damages, public policy forbids the accomplishment of the result by an estoppel. . . ."

This court concludes for the reasons stated above that any judgment against the insurance company defendants must be limited to compensatory damages plus interest and costs.

Finally, at the motion hearing on 25 October 1979, one of the attorneys for Defendant Continental Casualty Company filed a motion to dismiss and vacate judgment and alternative motion for rehearing. The theory of this motion is that the court lacked in personam jurisdiction over Honda Motor Company, Ltd. under Florida's long-arm statute, Fla. Stat. 48.182. This issue has previously been ruled on and no showing was made to justify reconsideration of the court's previous ruling (see orders entered herein on 6 December 1976 and 4 February 1977). Hence said motion will be denied.

DONE AND ORDERED in Chambers at Orlando, Florida, this 2nd day of November, 1979.

/s/ JOHN A. REED, JR.
John A. Reed, Jr.
JUDGE

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MERCURY MOTORS EXPRESS, INC.,

Petitioner,

v.

PATRICIA LYNN SMITH, as Personal Representative of the Estate of David Jefferson Faircloth, Jr., deceased, and for the benefit of David Jefferson Faircloth, III, a minor, son of David Jefferson Faircloth, Jr., deceased,

Respondent.

No. 57368.

Supreme Court Of Florida

Jan. 22, 1981.

Sheridan K. Weinstein of Papy, Poole, Weissenborn & Papy, Coral Gables, for petitioner.

Headley & Headley, Miami, and Mark Hicks of Daniels & Hicks, Miami, for respondent.

Larry Klein, West Palm Beach, for The Academy of Florida Trial Lawyers, amicus curiae.

ALDERMAN, Justice.

We accept jurisdiction of this case because the decision of the district court, reported at 372 So.2d 116 (Fla. 3d DCA 1979), conflicts with *Alexander* v. *Alterman Transport Lines, Inc.*, 350 So.2d 1128 (Fla. 1st DCA 1977).

Richard Welch, an employee of the petitioner, Mercury Motors Express, while driving a tractor-trailer for his employer, lost control of the vehicle, drove off the road, and hit David J. Faircloth, Jr., causing his death. Respondent, the personal representative of the decedent's estate and the plaintiff in the trial court, alleged that Welch, "while acting in the scope of his employment with the Defendant, MERCURY MOTORS EXPRESS, INC.," was "driving and operating the said vehicle while under the influence of alcohol to the extent that his ability to drive was impaired and did so in a reckless

and negligent manner and at an excessive rate of speed, with a willfull and wanton disregard for the life and safety of others. . . ." Mercury Motors does not dispute these factual allegations, and for the purpose of our review, we accept them as true. When the case was tried, the jury awarded the plaintiff $400,000 compensatory and $250,000 punitive damages. Mercury Motors paid the compensatory damage award and appealed only the punitive damage judgment. In a brief opinion, the district court said that the legal issue presented "is whether a corporate employer and Interstate Commerce Commission permit holder can be liable in punitive damages for the willful and wanton misconduct of its employee while acting within the scope of his employment and operating a tractor and trailer leased by the corporate employer and operated under its permit." *Mercury Motors Express, Inc.* v. *Smith*, 372 So.2d at 116. The district court, concluding that "a jury may assess punitive damages against a corporate employer when its employee, acting within the scope of his employment, has been guilty of willful and wanton misconduct, such as in this case," affirmed the award of punitive damages. 372 So.2d at 117. We quash the decision of the district court and hold that, in the absence of some fault on the part of the corporate employer, it is not punitively liable for the willful and wanton misconduct of its employees.

[1] We begin our analysis of this case by affirming the long-established Florida rule that "the liability of a corporate master for punitive or exemplary damages for wanton or malicious torts committed by an agent or servant is no different from the liability of an individual master under the same circumstances." *Winn & Lovett Grocery Co.* v. *Archer*, 126 Fla. 308, 171 So. 214, 221 (1936). The fact that the employer in this case is a corporation rather than a natural person is not legally significant.

[2, 3] The determinative issue is under what circumstances may an employer under the doctrine of respondeat superior be held vicariously liable for punitive damages as the result of the willful and wanton misconduct of his employees committed while acting in the scope of their employment. Relevant to this issue is the distinction between compensatory and punitive damages. The objective of compensatory damages is to make the injured party whole to the

extent that it is possible to measure his injury in terms of money. The plaintiff received $400,000 for compensatory damages, and the sufficiency of that award is not questioned. Punitive damages, on the other hand, go beyond the actual damages suffered by an injured party and are imposed as a punishment of the defendant and as a deterrent to others. *Fisher* v. *City of Miami*, 172 So.2d 455 (Fla. 1965).

Plaintiff effectually argues that under the doctrine of respondeat superior, an employer without fault on his part will always be vicariously liable for punitive damages for the willful and wanton misconduct committed by his employees within the scope of their employment. We reject this argument.

In *Alexander* v. *Alterman*, the First District Court, in a similar factual situation, held that the plaintiff's complaint was sufficient to allege liability on the part of the employer for compensatory damages caused by the negligent acts of its truck driver employee, but appropriately asked: "[W]hat wrong did Alterman commit that demanded that it be punished?" Answering that question, the district court said:

> According to the third amended complaint, Alterman's gross negligence was solely the act of operating a trucking business. Not a single allegation is found as to Alterman's negligently failing to investigate or to otherwise verify Penley's ability to operate its truck in a law abiding manner; there is not a single allegation that Alterman knew or should have known Penley's propensity to consume alcoholic beverages; there is not a single allegation that Alterman knew or should have known that Penley would operate its truck in a "grossly negligent manner and with outrageous, willful, wanton and utter disregard for other vehicles and users." . . .
>
> [T]he third amended complaint before use contains no allegation from which a jury could lawfully infer that the corporate defendant was negligent by employing or retaining in its employment the defendant, Penley, or that he possessed dangerous propensities known or which should have been known to his employer.

350 So.2d at 1130. The First District Court correctly held that in the absence of fault, an employer is not vicariously liable for punitive damages as the result of the actions of its employees within the scope of their employment.

After the district court's decision in *Alexander* v. *Alterman Transport Lines, Inc.*, 350 So.2d 1128 (Fla. 1st DCA 1977), the plaintiff in that case was allowed to amend his complaint as to punitive damage, and, when the case was tried, he was awarded punitive damage against the employer. The case was again appealed to the First District Court of Appeal which affirmed the punitive damage award. *Alexander* v. *Alterman Transport Lines, Inc.*, 387 So.2d 422 (Fla. 1st DCA 1980). The amended complaint on which the case was tried alleged that Alterman Transport Lines knew or, in the exercise of reasonable care, should have known that immediately prior to embarking on his work assignment, its employee was in no condition to drive and operate his truck since he was under the influence of alcohol or some other drug or narcotic to the extent that his normal faculties were impaired, making it unsafe for him to drive. The issue of Alterman's knowledge of its employee's condition was presented to the jury by the court's instructions. In the most recent *Alexander* decision, it is clear that the plaintiff alleged and the jury found fault on the part of the employer.

Alterman sought reversal of the punitive damage award by contending that even if its employee was intoxicated when he appeared at the terminal on the morning of the accident and even if it either knew or, in the exercise of reasonable care, should have known of his condition when he took charge of the truck, such conduct on its part was not sufficiently willful, wanton, or outrageous to justify an award of punitive damages. The district court correctly rejected this contention and held that willful, wanton, or outrageous conduct on the part of the employer, independent of the willful, wanton, or outrageous conduct of its employee-driver, is not a prerequisite to the vicarious punitive damage liability of the employer. In its earlier decision, the First District properly rejected the possibility of Alterman's vicarious liability for punitive damages under the doctrine of respondeat superior, where the plaintiff alleged the willful, wanton, or outrageous conduct of the employee within the scope of his employment but failed to allege any fault on the part of the employer. A different result was justified in the subsequent case because the plaintiff alleged and proved not only willful, wanton, or outrageous conduct on the part of the employee but also negligence on the part of the employer which contributed to the plaintiff's injury. Under those circumstances, the

employer was properly held vicariously liable for punitive damages based upon the willful, wanton, or outrageous conduct of its employee.

An analogous situation involving the dangerous instrumentality doctrine was presented to the Second District Court in *Waldron* v. *Kirkland*, 281 So.2d 70 (Fla. 2d DCA 1973). In that case, the plaintiff sought punitive damages against the owner of the motor vehicle based upon the flagrant and reckless misconduct of the driver. The determinative issue was whether the owner, who was without fault, was vicariously liable for punitive damages. The district court affirmed the trial court's partial summary judgment denying the plaintiff's claim for punitive damages. The court said that the owner did not know his stepson, the driver, was drinking on the date of the accident or had ever consumed alcoholic beverages and concluded that had the owner known of his stepson's propensity to drink, he would not have consented to his use of the motor vehicle. Acknowledging that the owner would be vicariously liable for *compensatory* damages, the court held that public policy is not served by also imposing liability for punitive damages when the owner is without fault. In other words, the court held that under the dangerous instrumentality doctrine, an owner is not vicariously liable for punitive damages just because he owned the motor vehicle.

As noted by the district court in *Alexander* v. *Alterman Transport Lines, Inc.*, 350 So.2d at 1130, the issue presented in the present case was not considered or passed on by this Court in *Bould* v. *Touchette*, 349 So.2d 1181 (Fla. 1977). In *Bould*, the plaintiff was awarded punitive damages against United States Concrete Pipe Company, the employer of Mitchell Touchette, who, in the course and scope of his employment, negligently caused the accident which was the subject of that suit. The only issue concerning punitive damages was Concrete Pipe's contention that the award was excessive. The vicarious liability of the employer, Concrete Pipe, for punitive damages in the absence of fault on its part was not an issue in the case and was not considered by this Court.

[4-6] We conclude that the principles of law which should be applied in this and in other similar respondeat superior cases are as

follows: (1) An employer is vicariously liable for *compensatory* damages resulting from the negligent acts of employees committed within the scope of their employment even if the employer is without fault. This is based upon the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer. (2) Punitive damages, however, go beyond the actual damages suffered by an injured party and are imposed only as a punishment of the defendant and as a deterrent to others. (3) Before an employer may be held vicariously liable for punitive damages under the doctrine of respondeat superior, there must be some fault on his part. (4) Although the misconduct of the employee, upon which the vicarious liability of the employer for punitive damages is based, must be willful and wanton, it is not necessary that the fault of the employer, independent of his employee's conduct, also be willful and wanton. It is sufficient that the plaintiff allege and prove some fault on the part of the employer which foreseeably contributed to the plaintiff's injury to make him vicariously liable for punitive damages.

[7] Applying these principles, we hold that there is no basis for the punitive damage award against the defendant employer. The plaintiff alleges no fault on the part of the employer and relies entirely upon the master-servant relationship to make the employer vicariously liable for punitive damages. The district court should have reversed the punitive damage judgment.

In view of our determination that the punitive damage award must be reversed, we need not consider petitioner's second point. The decision of the district court is quashed, and this cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

BOYD, OVERTON, ENGLAND and McDONALD, JJ., concur.

OVERTON, J., concurs with an opinion, with which McDONALD, J., concurs.

SUNDBERG, C.J., and ADKINS, J., dissent.

OVERTON, Justice, concurring.

The public should clearly understand that there is no differnce between the owner of a single motor vehicle and the operator of a truck line. If either one knowingly allows an intoxicated driver to drive his vehicle, he may be liable for punitive damages as well as compensatory damages.

McDONALD, J., concurs.

Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15 U.S.C.

§ 1381. Congressional declaration of purpose

Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the national driver register.

Pub.L. 89-563, § 1, Sept. 9, 1966, 80 Stat. 718.

15 U.S.C.

§ 1391. Definitions

As used in this subchapter —

(1) "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

(2) "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment

performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

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15 U.S.C. § 1392

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(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * * * *

(f) In prescribing standards under this section, the Secretary shall —

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

* * * * *

15 U.S.C. § 1397

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(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Pub.L. 89-563, Title I, § 108, Sept. 9, 1966, 80 Stat. 722.

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28 U.S.C.

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.